Supreme Court, U. S.
FILED
JUL 1 1977
MICHAEL RODAK, JR., CLERK

No. 76-1611

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAYMOND L. SCHARF, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1611

RAYMOND L. SCHARF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-53) is reported at 551 F. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1977. A petition for rehearing was denied on April 19, 1977. The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a collateral attack on his conviction, petitioner was automatically entitled to withdraw his

guilty plea because the district court failed to inquire into the existence and terms of a plea bargain before accepting the plea.

STATEMENT

On September 20, 1976, petitioner entered a guilty plea in the United States District Court for the Eastern District of Missouri to one count of conspiracy to use extortionate means to obstruct interstate commerce, in violation of 18 U.S.C. 1951. Petitioner's plea was entered pursuant to a bargain whereby the government agreed to dismiss six related substantive counts, including a charge of engaging in racketeering activities (in violation of 18 U.S.C. 1962) which, in addition to fine and imprisonment, provided for forfeiture of a convicted defendant's business property acquired or maintained through such illegal conduct. See 18 U.S.C. 1963(a). On October 22, 1976, petitioner was sentenced to ten years' imprisonment (Pet. App. 30, 32, 36–37).

Four days prior to his guilty plea, petitioner was also found guilty after a jury trial of willfully failing to collect, account for, and pay over to the government federal withholding taxes, in violation of 26 U.S.C. 7202. On the day of petitioner's sentencing on the Hobbs Act conviction, the Internal Revenue Service levied upon and seized petitioner's assets to satisfy his tax liability (Pet. App. 40–41). Two months later, on December 22, 1976, petitioner filed a "motion to set aside judgment and vacate plea" (Pet. App. 22–27), alleging, *inter alia,* that the I.R.S. seizure of his property to satisfy the tax levy violated the terms of the

plea bargain and that, in accepting his guilty plea, the district court had failed to comply fully with the requirements of Rule 11 of the Federal Rules of Criminal Procedure because it had not inquired into the existence and terms of the plea bargain (Pet. App. 26, 67–70).

Without conducting a hearing, the district court denied petitioner's motion to withdraw his guilty plea, finding that the plea had been intelligently and voluntarily entered and that petitioner had made no showing of "manifest injustice," as required by Rule 32(d), Fed. R. Crim. P. (Pet. App. 28–29). The court of appeals reversed and remanded for an evidentiary hearing. Although it concluded that the district court had violated Rule 11(d) and (e)(2), Fed R. Crim. P., by not determining whether petitioner's plea was the result of an agreement with the government and, if so, requiring disclosure of the specific terms of the agreement, the court below held that this procedural defect did not necessarily require petitioner's conviction to be set aside and that a reversal would be warranted only if the government had in fact breached the plea bargain (Pet. App. 50–51). Since it was unclear from the record whether petitioner's plea had been prompted solely by the government's promise to dismiss the other counts of the indictment or whether it had also been based upon petitioner's belief that his property would be exempt from seizure, either under the forfeiture provisions of 18 U.S.C. 1963 or pursuant to a tax levy, the court of appeals remanded to the district court "to hold an evidentiary hearing[]

to determine what the terms of the plea bargain were and whether the bargain was breached, and whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand" (Pet. App. 53).

ARGUMENT

Relying on this Court's decision in *McCarthy* v. *United States,* 394 U.S. 459, petitioner contends that once the court of appeals found that various procedural requirements of Rule 11 had not been satisfied, it was required automatically to vacate his conviction. *McCarthy* involved a direct appeal from a conviction entered after a seriously defective guilty plea proceeding in which the district court, in gross disregard of Rule 11, had not even ascertained whether the defendant understood the nature of the charges against him. In reversing the conviction, the Court held that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 472.

The "automatic reversal" rule of *McCarthy* was designed in large part to ensure strict compliance with the 1966 version of Rule 11, which worked major, beneficial changes in the plea-taking process in the federal courts by requiring personal interrogation of the defendant, on the record, about the voluntariness of and factual basis for his guilty plea. We believe it to be a question of considerable importance whether the result that *McCarthy* found to be appropriate to enforce the 1966 version of Rule 11 should continue to be applied to pleas taken in

technical violation of the amended Rule 11, effective December 1, 1975, which substantially expands the procedural requirements that a district court must follow prior to accepting a plea to include numerous elements having no substantial effect upon the plea's voluntariness.[1] There is no need to resolve this important question here, however, because, regardless of the continuing applicability of *McCarthy* to technical violations of Rule 11 that are raised on direct appeal or in a timely motion to withdraw the guilty plea, petitioner is not entitled to collateral relief from his conviction.[2]

As the Court recently noted in *Davis* v. *United States,* 417 U.S. 333, 346, quoting from *Hill* v. *United States,* 368 U.S. 424, 428–429, " 'collateral relief is not available when all that is shown is a failure to

---

[1] See, *e.g., United States* v. *Journet,* 544 F. 2d 633, 636–637 (C.A. 2) (failure to advise defendant, *inter alia,* that "if he should decide to plead guilty the court would have the right to ask him questions under oath about the offense, in which event, if he should give untrue answers, his statements under oath could be used against him in a prosecution for perjury"); *United States* v. *Boone,* 543 F. 2d 1090 (C.A. 4) (same).

[2] Although petitioner's "motion to set aside judgment and vacate plea" apparently was brought under Rule 32(d), Fed. R. Crim. P., motions made under Rule 32(d) and those under 28 U.S.C. 2255 "largely overlap." 5 Orfield, *Criminal Procedure under the Federal Rules* 236 (1967). See *United States* v. *Watson,* 548 F. 2d 1058 (C.A.D.C.). Here, petitioner's Rule 32(d) motion was filed two months after sentencing and thus well after the time in which to appeal his conviction had expired. See Rule 4(b), Fed. R. App. P. It therefore should properly be regarded as a collateral attack on the conviction. See *Andrews* v. *United States,* 373 U.S. 334, 338 (in post-conviction proceeding, " 'adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents' "); *Hill* v. *United States,* 368 U.S. 424, 430.

comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *" (*ibid.*). See also *Stone* v. *Powell*, 428 U.S. 465, 477, n. 10; *Del Vecchio* v. *United States*, C.A. 2, No. 76-2165, decided May 24, 1977; *United States* v. *Hamilton*, 553 F. 2d 63 (C.A. 10), pending on petition for a writ of certiorari, No. 76-1818; *Johnson* v. *United States*, 542 F. 2d 941 (C.A. 5), certiorari denied, No. 76-5893, March 21, 1977; *McRae* v. *United States*, 540 F. 2d 943 (C.A. 8); *Bell* v. *United States*, 521 F. 2d 713 (C.A. 4), certiorari denied, 424 U.S. 918; *Bachner* v. *United States*, 517 F. 2d 589 (C.A. 7). Accordingly, the court of appeals correctly refused to vacate petitioner's conviction merely because Rule 11 may have been violated and instead remanded for an evidentiary hearing to determine whether petitioner had been prejudiced by the defect. See *United States* v. *Kattou*, 548 F. 2d 760 (C.A. 8).

Although, as petitioner notes (Pet. 14–15), several circuits have relied upon *McCarthy* to grant Section 2255 relief to defendants whose guilty plea was accepted in technical noncompliance with Rule 11 (see *United States* v. *Harris*, 534 F. 2d 141 (C.A. 9); *United States* v. *Yazbeck*, 524 F. 2d 641 (C.A. 1);

United States v. *Wolak*, 510 F. 2d 164 (C.A. 6); *Roberts* v. *United States*, 491 F. 2d 1236 (C.A. 3)), none of these courts analyzed the defendant's claim in terms of the crucial distinction between direct and collateral attacks upon a conviction. The conflict among the circuits may reasonably be expected to disappear as this issue continues to be litigated in the lower courts in light of the proper standard for granting collateral relief outlined in *Davis*. Indeed, within the past year two courts of appeals have reconsidered their previous rulings and have adopted the view we advocate. Compare *Del Vecchio* v. *United States*, *supra*, with *Ferguson* v. *United States*, 513 F. 2d 1011 (C.A. 2), and *McRae* v. *United States*, *supra*, with *United States* v. *Richardson*, 483 F. 2d 516 (C.A. 8).[3]

Finally, whatever the merit of petitioner's contentions in other contexts, there is no necessity for further review at this time. The court of appeals did not hold that petitioner was not entitled to withdraw his plea, but rather that further proceedings in the district court were necessary to elicit the relevant facts. The record when fully developed on remand may show that petitioner was prejudiced by the district court's failure to ascertain the precise details of the plea bargain prior to accepting petitioner's guilty plea and that petitioner is therefore entitled to withdraw his plea.

---

[3] The issue is now pending in the Sixth Circuit, *Timmreck* v. *United States*, 423 F. Supp. 537 (E.D. Mich.), notice of appeal filed December 28, 1976.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

JULY 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977